Filed 10/7/10 In re G.O. CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

In re G.O., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. G.O., Defendant and Appellant.	C063635 (Super. Ct. No. 52005961)

Delinquent minor G.O. appeals from a juvenile court order imposing as a condition of probation that he submit to a psychological evaluation. The juvenile court ordered the evaluation to enable the court to fashion appropriate sex offender treatment orders. The record was in conflict whether the minor had engaged in opportunistic sexual conduct, or was a budding sexual predator, and the court decided a psychological evaluation was necessary to resolve that conflict.

Both parties agree the probation condition was overbroad. The minor contends the evaluator's report should be limited to a

set of treatment recommendations. The Attorney General contends the report must reflect the facts and analysis supporting the treatment options, but agrees the report should be restricted to the juvenile court and the probation officer.

We generally agree with the Attorney General. Without the facts and analysis supporting the treatment recommendations, the juvenile court would have no basis to evaluate them, which would, in effect, delegate to the doctor the power to fashion dispositional orders. However, we agree with a subsidiary point made by the minor: The report should avoid, *where possible*, unnecessary incriminating factual detail.

We shall remand with directions to the juvenile court to modify the probation condition, and otherwise affirm.

FACTS AND PROCEEDINGS

On August 31, 2009, the minor was charged with seven sexual offenses, specifically, continuous sexual abuse of a child under the age of 14, three counts of lewd and lascivious acts, and three counts of oral copulation with a minor. (Pen. Code, §§ 288, subd. (a), 288.5, subd. (a), 288a, subd. (b)(1).)

On September 17, 2009, the minor admitted the continuous sexual abuse count, and agreed the other counts could be considered for dispositional purposes.

The probation report states that after their father caught them in a sexually compromising position in the minor's bed, the victim, the minor's adopted sister, reported that the minor had been having sexual contact with her beginning when she was 9 or 10 years old, and continuing until just before she turned 13

years old, and she stated that “she kept engaging in the sexual activities so he wouldn’t do it to her younger sister.” The minor, aged 16, admitted sexual contact with his adopted sister, but described it as of recent origin, and not as extensive as she described. The minor had been “in counseling on and off since age six after being diagnosed with ADHD,” and under the heading “Child Protective Services” (CPS), the report states “there have been 10 inconclusive referrals in Los Angeles County for physical and sexual abuse, general neglect, and caretaker absent.” The report recommended the minor complete an approved sex offender treatment program.

On October 2, 2009, the prosecutor noted the differences between the victim’s and the minor’s versions of the extent and duration of the abuse, and stated a psychological evaluation of the minor was needed, to ensure his treatment plan was adequately tailored. The prosecutor also noted the minor might himself have been an abuse victim in the past, based on the Los Angeles County CPS referrals.

The minor’s counsel objected to a psychological evaluation, contending that the recommended sex offender treatment program would be sufficient, at least initially.

The juvenile court declared the minor a ward, and placed him on probation. In part, the court ordered the minor to complete the recommended sex offender treatment program. The court also ordered a psychological evaluation to be completed by Dr. Nelson. The court agreed with the prosecutor’s concerns, and stated: “Given the nature of the crime, seriousness of the

crime in this matter, the fact that I don't understand a lot of what was happening in this case other than the information that was provided to me in the petition and in this disposition report, I think it's very important for everybody, the public and for G[.], his treatment providers, that they understand the potential risks and all those risks are identified and evaluated in this matter. I think it's going to help dial [*sic*, as in calibrate?] also the level of treatment. . . . A [Welfare and Institutions Code section] 730 I think is indispensable in this matter."

We note that Welfare and Institutions Code section 730, subdivision (b) provides in part that, in setting probation conditions, "[t]he court may impose and require any and all reasonable conditions that it may determine fitting and proper to the end that justice may be done and the reformation and rehabilitation of the ward enhanced."

On October 8, 2009, the minor's counsel made a more formal objection, arguing the minor "needs to have a confidential relationship with mental health providers" who would make recommendations to the probation department, "without having a full-blown report revealing the content of conversations that he might have with the doctor." The parties and the probation officer discussed ways to settle their differences, but concerns about the possible revelation of other crimes to Dr. Nelson, a mandated reporter, thwarted their efforts. To allow the parties to discuss the matter further, the court set the evaluation order aside.

On October 9, 2009, the juvenile court stated, "I need that information in order to make sure that we have an appropriate treatment plan in place for G[.] . . . Probation has no idea how to formulate a service plan for G[.] without that [Welfare and Institutions Code section] 730." The prosecutor stated that if the minor refused to cooperate with the evaluation, she might recommend committing the minor, to protect the public. The minor's counsel noted that she had provided the prosecutor with a September 10, 2009 report by Dr. Eugene Roeder, a psychologist, prepared "for the purposes of [an Evidence Code section] 1017 evaluation[,]" which had a summary diagnosis and recommendation.

We note that where the court has ordered an Evidence Code section 1017 evaluation, the minor lacks the ability to assert a psychotherapist-patient privilege. (See *In re Mark L.* (2001) 94 Cal.App.4th 573, 584, fn. 8 (*Mark L.*).)

The prosecutor objected that Dr. Roeder's report did not reflect the facts he relied on, and the probation officer in part stated "it's really not going to do us any good anyway." Dr. Roeder's report, which neither the court nor the probation officer had seen, is not in the record.

The juvenile court found it was in the minor's best interest "to get an appropriate diagnosis, and then a full treatment plan proposed by a doctor."

The order was stayed to allow the minor to file a writ, but the stay was vacated on October 23, 2009.

On November 5, 2009, in response to the minor's writ petition, we issued a stay of the order. (*G.O. v. Superior Court* (Nov. 5, 2009, C063284) [nonpub. order].)

On December 3, 2009, the minor filed this appeal.

On January 14, 2010, we summarily denied the writ petition. (*G.O. v. Superior Court* (Jan. 14, 2010, C063284) [nonpub. order].)

DISCUSSION

Before addressing the merits, we address a procedural point. The notice of appeal states the appeal is taken from orders made on October 2, 8 and 9, 2009. The Attorney General contends the notice of appeal was untimely as to the October 2, 2009 order imposing the evaluation condition. However, that order was set aside upon the minor's objection, on October 8, 2009. The next day, October 9, 2009, the court reimposed the evaluation order, and the Attorney General impliedly concedes the notice of appeal was timely as to that order. That order was a subsequent order after the judgment that substantially affected the minor's rights and, hence, was appealable. (Welf. & Inst. Code, § 800, subd. (a); see 10 Witkin, Summary of Cal. Law (10th ed. 2005) Parent & Child, § 915, pp. 1117-1118.) The fact the notice of appeal incorrectly but prophylactically mentioned the already-vacated October 2 order, does not make the appeal untimely as to the properly-designated October 9 order. (See 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 561, p. 640.)

The minor seeks the following remedy: "The [juvenile] court should modify its order to instruct Dr. Nelson to curtail factual discussions and limit the content of the evaluation to appropriate treatment recommendations." The Attorney General proposes that any statements by the minor should be disclosed only to the juvenile court and probation officer. Again, we generally agree with the Attorney General.

Preliminarily, we observe that this issue would not arise in a criminal case, because a criminal defendant could reject probation. However, unlike a criminal defendant, a delinquent lacks the power to reject probation, because "in the juvenile context, a grant of probation is not an act of leniency but the preferred disposition under the particular circumstances." (Cal. Judges Benchguide 119, *Juvenile Delinquency Disposition Hearing* (CJER 2009) § 119.43 (Benchguide); see *In re Francisco S.* (2000) 85 Cal.App.4th 946, 953-954.) And, unlike a delinquent, a criminal defendant may assert the psychotherapist-patient privilege even where psychotherapy is ordered as a condition of probation. (See *Story v. Superior Court* (2003) 109 Cal.App.4th 1007, 1014-1019.)

In *In re Pedro M.* (2000) 81 Cal.App.4th 550 (*Pedro M.*), one of the minor's probation conditions was that he cooperate "'in a plan for psychiatric, psychological testing or treatment'" as part of a sex offender treatment program. (*Id.* at p. 553.) After the juvenile court sustained a supplemental petition alleging the minor had violated that condition, the minor was committed to the former California Youth Authority. (*Ibid.*) In

part the minor contended the juvenile court improperly considered the testimony of his therapist, after the minor interposed the psychotherapist-patient privilege. (*Id*. at p. 554.) The *Pedro M*. court rejected this claim, as follows:

"It is, of course, well settled that '[a] juvenile court enjoys broad discretion to fashion conditions of probation for the purpose of rehabilitation and may even impose a condition of probation that would be unconstitutional or otherwise improper so long as it is tailored to specifically meet the needs of the juvenile. [Citation.]' [Citations.] In the instant case, the juvenile court determined that appellant's rehabilitation necessitated his participation and cooperation in a sex offender treatment program, a determination that was clearly within the court's authority to make given appellant's commission of sex-related offenses.

"Quite obviously, the court's ability to evaluate appellant's compliance with this particular condition of the court's disposition order and its effect on his rehabilitation would be severely diminished in the absence of some type of feedback from the therapist, and it would be unreasonable for appellant to think otherwise. [Citation.] Indeed, Evidence Code section 1012 itself permits the disclosure of a confidential communication between patient and psychotherapist to 'those to whom disclosure is reasonably necessary for . . . the accomplishment of the purpose for which the psychotherapist is consulted . . . .' In our view, this would include the juvenile court, where the patient is a delinquent minor who has

been properly directed to participate and cooperate in a sex offender treatment program in conjunction with a disposition order placing the minor on probation. Moreover, the juvenile court carefully sought to circumscribe [the therapist's] testimony 'so that the details of the therapeutic session [would] not [be] disclosed.' As a consequence, no testimony was admitted regarding any specific statements appellant had made to [the therapist], any advice given to appellant by [the therapist], or any diagnosis made by [the therapist]. Under the circumstances, therefore, we hold that the psychotherapist-patient privilege did not preclude [the therapist] from testifying at the adjudication of the supplemental petition concerning appellant's participation and progress in the court-ordered treatment plan." (*Pedro M.*, *supra*, 81 Cal.App.4th at pp. 554-555.)

Although *Pedro M.* involved a later procedural posture, involving the violation of a probation condition, rather than the initial crafting of a valid probation condition, it holds that in a case involving a juvenile sexual offender, the juvenile court judge is entitled to receive information about a minor's therapy, in order to monitor the minor's treatment, with the ultimate goal of rehabilitation. (See also *Mark L.*, *supra*, 94 Cal.App.4th at pp. 581-584 [similar holding in dependency case, following *Pedro M.*]; *In re Kristine W.* (2001) 94 Cal.App.4th 521, 525-528 ["we affirm the juvenile court's order only to the extent it permits disclosure by Kristine's therapist of matters that reasonably assist the court in evaluating

whether further orders are necessary for Kristine's benefit and preserves the confidentiality of the details of her therapy"].)

We also take guidance from *In re Christopher M.* (2005) 127 Cal.App.4th 684 (*Christopher M.*), although that case did not involve a juvenile sexual offender. Christopher M. had committed a hate-crime robbery. (*Id.* at pp. 687, 689.) He was part of a group who robbed one particular victim, but the minor had also videotaped the group committing "a series of similar incidents in which they assaulted and/or robbed transients, illegal aliens and a 'retarded' man." (*Id.* at p. 688.)

The juvenile court imposed the following probation condition: "'[A]ll records related to the treatment of [Christopher] . . . be made available upon request to the Court and Probation Department by all individuals, agencies and entities that are either paying for or providing health or psychological treatment or assessment services to [Christopher].'" (*Christopher M.*, *supra*, 127 Cal.App.4th at p. 687; see also *id.* at p. 690, fn. 5.) The juvenile court overruled an objection, "indicating that 'in trying to rehabilitate as opposed to punish' Christopher, the court needed to 'have access to this information.'" (*Id.* at p. 690.)

Noting that the record showed Christopher M. lacked empathy for his victims, had had a prior probation grant, and was involved with drugs and gangs, *Christopher M.* found the juvenile court needed access to his therapy records: "The probation conditions at issue here, and the access to Christopher's treatment records they provide, will assist the probation

officer and the court to determine whether Christopher is fully complying with the numerous conditions of his new grant of probation, and whether, in the interest of rehabilitation and reformation, treatment is succeeding in helping him to overcome his psychological, behavioral, and substance abuse problems." (*Christopher M.*, *supra*, 127 Cal.App.4th at p. 694.)

Christopher M. rejected a claim this violated the right to privacy: "Here, it is undisputed that Christopher has a privacy interest in his medical and psychological treatment records. However, the state has a legitimate countervailing interest in (1) protecting the public against Christopher's violent and antisocial conduct, and (2) determining both whether he is fully complying with the numerous conditions of his new grant of probation, and whether treatment is succeeding in helping him to gain empathy for others, renounce completely his gang affiliation, and overcome his substance abuse problem." (*Christopher M.*, *supra*, 127 Cal.App.4th at p. 695.)

After rejecting a claim of privilege (see *Pedro M.*, *supra*, 81 Cal.App.4th 550), *Christopher M.* held: "Here, by reasonably limiting disclosure of otherwise privileged psychotherapist-patient communications to the probation officer and the court, the court acted under the authority of Evidence Code section 1012 and avoided unnecessary disclosure of those communications. Given this limited scope of disclosure, Christopher's history of antisocial behavior, his participation in crimes of violence against people he perceived as either unable or unwilling to defend themselves, and his demonstrated unwillingness to

complete conditions of probation, we hold that the court did not violate the psychotherapist-patient privilege . . . . In the event Christopher hereafter claims that specific disclosures of his psychotherapy records to the court and probation officer may jeopardize his rehabilitative progress, the juvenile court in its discretion may review and decide such a claim." (*Christopher M.*, *supra*, 127 Cal.App.4th 696.)

Although *Christopher M.* did not involve a juvenile sexual offender, we agree with its resolution of the problem posed when, as in this case, the juvenile court needs information about a minor's mental state and treatment, in order to monitor and fashion an appropriate rehabilitative plan for the minor. Limiting disclosure of the reports to the juvenile court and the probation officer--an official the minor concedes "reports to the court itself" (*People v. Stuckey* (2009) 175 Cal.App.4th 898, 912)--strikes the proper balance between the juvenile court's need for access to the information, and the minor's privacy interests, and patient privilege.

In contrast, the minor's proposal, that Dr. Nelson file a bare list of treatment recommendations, is not appropriate.

As we have previously explained in a civil case: "The value of opinion evidence rests not in the conclusion reached but in the factors considered and the reasoning employed. [Citations.] Where an expert bases his conclusion upon assumptions which are not supported by the record, upon matters which are not reasonably relied upon by other experts, or upon factors which are speculative, remote or conjectural, then his

conclusion has no evidentiary value. [Citations.] In those circumstances the expert's opinion cannot rise to the dignity of substantial evidence. [Citation.] When a trial court has accepted an expert's ultimate conclusion without critical consideration of his reasoning, and it appears the conclusion was based upon improper or unwarranted matters, then the judgment must be reversed for lack of substantial evidence." (*Pacific Gas & Electric Co. v. Zuckerman* (1987) 189 Cal.App.3d 1113, 1135-1136 (*PG&E*); see *Bushling v. Fremont Medical Center* (2004) 117 Cal.App.4th 493.)

Under the minor's proposal, Dr. Nelson would file his treatment recommendations, with no supporting facts or analysis. That would give the juvenile court no basis to evaluate the propriety and adequacy of those recommendations, but would require the juvenile court to accept "an expert's ultimate conclusion without critical consideration of his reasoning" in the manner we have condemned. (See *PG&E*, *supra*, 189 Cal.App.3d at pp. 1135-1136.) Further, it would in effect delegate to Dr. Nelson the authority to fashion the minor's dispositional orders, thereby usurping the juvenile court's duty. (See generally, Benchguide, *supra*, §§ 119.15-119.16, 119.30-119.31 [describing juvenile court's broad discretion to chose among dispositional options and formulate probation conditions].)

However, we agree with a subsidiary point mentioned by the minor. As in *Pedro M.*, *where possible* without sacrificing necessary information, the report should eschew incriminating

factual detail. (See *Pedro M.*, *supra*, 81 Cal.App.4th at pp. 554-555.)

The juvenile court must modify the terms of the challenged probation condition consistent with our discussion herein.

DISPOSITION

The cause is remanded with directions to the juvenile court to modify the minor's probation conditions consistent with this opinion. In all other respect, the judgment is affirmed.

HULL, Acting P. J.

We concur:

BUTZ, J.

CANTIL-SAKAUYE, J.